IN THE

Supreme Court of the United States

October Term, 1948.

No. 450.

NANNIE ELLYSON POLLARD, MARY ELLYSON DOWDY, HATTIE ELLYSON MADDOX, *et al.*,
Petitioners,

v.

CLAYTON HAWFIELD, FRANCES GERTRUDE SCOTT, FLORENCE O. METZ, MARY ELIZABETH HARVEY and AUBREY HARVEY,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, DISTRICT OF COLUMBIA CIRCUIT.

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Your petitioners respectfully pray that a writ of certiorari issue from this Court to the United States Court of Appeals, District of Columbia Circuit (hereinafter referred to as the "Circuit Court"), to review its decision and final judgment entered on September 20, 1948 (R. 190), affirming the judgment and order of the United States District Court for the District of Columbia (hereinafter referred to as the "Trial Court"), which admitted to probate and record as the last will and testament of Mary Elizabeth Ellyson, de-

ceased, a paper writing dated April 14, 1944 (R. 1-2; Tr. 1-2, photo copy). These petitioners duly filed a petition for reconsideration and rehearing of the Circuit Court's decision, and it was denied on October 25, 1948 (R. 191-209). No opposition to this petition was filed by Respondents.

Statement of Matter Involved.

Judge Matthew F. McGuire presided in the Trial Court. The appeal was argued in the Circuit Court before Associate Judges Clark and Wilbur K. Miller, with whom also sat by designation District Judge Curran, of the court appealed from. The opinion is by Judge Clark (R. 186, 189). The opinion is devoid of so many material facts of record on which Petitioners' appeal was based, and its language so general concerning such contentions as it rules upon, that it could not be cited with confidence upon any point; and hence, if there were no other ground for this Court's jurisdiction, it is submitted that on this ground alone the opinion calls for the exercise of this Court's supervision over the lower Federal Courts. It is suggested that an opinion so lacking in clarity and essential details is unfair to the party against whom it is rendered. This Court's attention is particularly invited to the pages thereof shown at pp. 186 and 187 of the record. In this situation, Petitioners feel compelled to detail the facts in this statement more fully than would otherwise be necessary, and pray this Court's indulgence therefor.

The main issue in this will contest was, of course, whether or not the paper writing of April 14, 1944, was the will of Mary Elizabeth Ellyson (hereinafter referred to as "Testatrix"); the subsidiary issues being testamentary capacity, fraud and undue influence (R. 10, 17, 18). The case was tried to a jury, which, after a full five-day trial, brought in

a verdict on February 28, 1947, upholding the will on the issues of testamentary capacity and undue influence submitted to them; the Trial Judge directed a verdict on the issue of fraud (R. 17, 18, 169). The judgment and order appealed from was entered four days later (R. 22). Petitioners' motion for a new trial, duly filed, (R. 23-26) was summarily denied by the Trial Judge, without any findings or order except a notation on the motion "Denied. McGuire, J. 3/26/47"; the request of Petitioners' counsel for leave to argue the motion orally and submit newly-found law having been also refused (R. 23-27) by the Trial Judge, notwithstanding that at the trial he had asked Petitioners' counsel for authority about the competency of Dr. Luther H. Snyder to give an expert opinion on mental capacity, which authority counsel was unprepared at the time to furnish, and had excluded this witness' testimony *in toto* (R. 101; Tr. 368, 369).

The caveator-plaintiffs were Mrs. Mabel Adams (hereinafter referred to as "Mrs. Adams"), former companion and housekeeper for the Testatrix and a substantial beneficiary in a will executed by the Testatrix immediately prior to the contested paper (hereinafter referred to as "the will"), who was represented at the trial by separate counsel, Messrs. Diamond and Jackson (R. 11, 27), and did not appeal; and all the present petitioners, with the exception of Mrs. Ethel Ellyson Pollard, who died while the appeal has been pending and for whom there is no successor party. The caveatee-defendants, appellees below, were the respondents shown above. Clayton Hawfield (hereinafter called "Dr. Hawfield"), the executor named in the will, had been the Testatrix's physician since about 1931, and, after the will was executed, retained custody of it until after her death (R. 122, 150). Mrs. Frances Gertrude Scott (hereinafter called "Nurse Scott"), a legatee,

was a graduate nurse employed in such capacity for the Testatrix. Mrs. Florence O. Metz, also a legatee (hereinafter called "Mrs. Metz"), was a niece of the Testatrix, who resided in Arlington, Virginia. At the time of procurement and execution of the will, however, Mrs. Metz was living most of the time in the Testatrix's home, and was the Testatrix's attorney-in-fact under a power of attorney dated March 31, 1944, executed two weeks before the will was executed (R. 177; Tr. 37, 38, 39, photo copies). Miss Mary Elizabeth Harvey and Aubrey Harvey, both also legatees (hereinafter called "Miss Harvey" and "Mr. Harvey"), were a niece and grand-nephew, respectively, of the Testatrix; Mr. Harvey being Miss Harvey's nephew.

The Testatrix died on January 7, 1946, at the age of eighty-six years. She had never married, and her only heirs and next of kin were the children and grandchildren, including these Petitioners, of her several deceased brothers and sisters. At her death, she had been for about six years continuously confined to her bed (and unable to leave it except when lifted therefrom) by paralysis of her entire right side, which deprived her of the use of her right leg, arm and hand (R. 35, 40, 36, 102, 109, 142-147), and which followed in about a month a fall, in April, 1940, in which she struck her head against a door. There was testimony, too, that the paralysis was the result of a cerebral hemorrhage, by Mrs. Mattie Edwards (hereinafter referred to as "Nurse Edwards") (R. 35; Tr. 581-585). From the time she was stricken with paralysis up to and including the period during which the will was executed, the Testatrix had been administered constantly, day and night, the narcotic drugs pantopon and phenobarbital (R. 36, 41; Tr. 583).

Before Petitioners had rested their case, the Trial Judge announced his intention to direct a verdict for the Respondents on the issue of undue influence (R. 62, 96-98), but later

reversed this decision (R. 137, 169), stating he would submit that issue to the jury, but would withdraw from them instead the issue of fraud, which was done.

Prior to final arguments, and before the Trial Judge charged the jury, written prayers for instructions were submitted to the Trial Judge and discussed at the bench (R. 148, 149, 164, Tr. 570-578, 646). He thereupon denied Petitioners' Prayer No. 7, at the bottom of which was cited authority (R. 21, 22), for an instruction that a presumption of testamentary incapacity was raised by evidence of the Testatrix's incompetency to transact business immediately before and after the date of execution of the will *(Ralston v. Turpin,* 129 U. S. 663, cited in Doyle v. Rody); and tentatively granted their Prayer No. 2 (on the authority of *Hagerty v. Olmstead,* 39 App. D. C. 170, cited below the prayer), for an instruction that a presumption of undue influence was raised by special facts in evidence (R. 18-20). In thus tentatively granting this prayer, the Trial Judge expressed the opinion that a confidential relationship had been shown to have existed between the Testatrix and the legatee Mrs. Metz (Tr. 571). Later, however, but prior to arguments and charge to the jury (R. 164), he also denied Prayer No. 2, on the authority of the same case, stating, in effect, that no confidential relationship which could be an element in raising such a presumption had been shown. It will be noted that a confidential relationship also existed between the Testatrix and her nurse, Nurse Scott, also a legatee.

In 1931, 1932 and 1941, respectively, the Testatrix had executed three prior wills, and, in 1939, a codicil to the 1932 will (R. 3-5, 176). These papers, and the contested will, were introduced into evidence by Petitioners' counsel (R. 43, 77; Tr. 118-130), and photostatic copies are part of the original record herein (Tr. 3-12). From 1931 until

August of 1946, when a Collector *pendente lite* was appointed by the Court in these proceedings, the National Savings & Trust Company of Washington (hereinafter called the "Bank"), had carried a trust fund and account in the name of the Testatrix and handled her banking affairs. The Trial Judge, however, prohibited Petitioners' counsel from any inquiry concerning this account (R. 77-84, 95, 96; Tr. 280-304, 349). All the prior wills (and the codicil) had been prepared under the supervision of this Bank and witnessed by one or more of its officers, and in them the Bank was named executor and trustee of the residuary estate. The prior wills are alike in form, and consistently name as legatees some ten heirs and next of kin from the several branches of the Testatrix's family. The 1939 codicil makes a bequest of $2,000 to the housekeeper, Mrs. Adams, and the last prior will of 1941 includes the $2,000 bequest and provides for her to receive in addition one-tenth of the residuary estate.

Notwithstanding the fact that the Bank was then handling the Testatrix's financial affairs precisely as it had been doing for the previous thirteen years, the contested will was drawn and filed, and the execution thereof supervised (although not attested) by Mrs. Metz's attorney (R. 119, 120, 126, 160, 161, 166), who had never before acted as attorney for the Testatrix (R. 41, 44, 134). This attorney actively represented all the respondents at the trial (and on appeal), as their sole counsel, and was thus enabled, without taking the stand or otherwise testifying under oath, greatly to reinforce Respondents' case by questions of the tenor of: "Now tell * * * what happened from the time you saw me in her room" (R. 28); "Well, now, tell the Court and jury what happened * * * before I got there and from the time I got there" (R. 33); "Then subsequent to that, did you come to my office and have a power

of attorney written up?" (R. 114); "What discussion did you have with me, if any, about the will in the early part of March, '44?" (R. 152); "Now, Doctor, was there anything else said on the 13th while you and I were there?"; "Did I request that you get another witness?" (R. 152); and by *actually testifying personally in his argument to the Jury* (R. 166), without any protective measures being taken by the Trial Judge, when objection to this form of argument was twice made by Petitioners' counsel *(Katz v. Del. & H. R. Corp.*, 38 F. S. 698).

Through Mrs. Metz the Respondents attempted to raise the inference that the Bank had not been contacted about the new will because Mr. Hall, the Bank's trust officer, had failed to come to the house to see the Testatrix about some power of attorney for Mrs. Adams (R. 111, 112, 126), and Mrs. Adams had said she had had difficulty in contacting Mr. Hall in that matter. Yet Mrs. Metz also testified (R. 114, 115) that even before the power of attorney of March 31st was executed, two weeks before the will was executed, she, Mr. Brick (the attorney who drew the will) and Nurse Scott had conferred with Mr. Hall at the Bank about the Testatrix's account and business there; and that Mr. Brick had talked with the Bank about discharging Mrs. Adams even prior to her dismissal on March 20th (R. 136). And Mr. Hall also testified that Mr. Brick and Mrs. Metz had called together and conferred with him shortly after Mrs. Adams left (R. 78, 79). The Trial Judge, however, precluded this witness from answering questions by Petitioners' counsel as to whether or not his Bank had been in any manner informed about the new will (R. 78, 83).

As the prior testamentary papers most pointedly evidence, the will departs radically (in substance and form) from the fixed plan and purpose of the Testatrix as to the distribution of her property among relatives entertained

by her over a period of some thirteen years. In the 1944 will there are no specific bequests, except a legacy of $500 for Nurse Scott, never previously mentioned; nothing is left to Mrs. Adams, a legatee in the 1939 codicil and 1941 will, or to seven others mentioned in the 1941 paper; and, with the exception of the token bequest to Nurse Scott, the whole estate is bequeathed in blanket form to the Respondents Mrs. Metz, Miss Harvey and Mr. Harvey, share and share alike, and even the style of name of the residuary legatees is different from their designations in the previous papers.

On March 18, 1944, the bedridden Testatrix was attacked by a further illness so severe that an extra nurse was required, and Nurse Edwards was engaged as a night nurse to assist Nurse Scott, the regularly employed day nurse, and remained in such capacity until about the last of April (R. 35-38, 147, 148). And about this time Mrs. Metz, who had previously visited her aunt, according to Mrs. Adams' testimony (R. 38), only occasionally, practically took up residence at the Testatrix's home and assumed control of her finances and person (R. 39, 84-90, 129). As to the nature of this illness, several witnesses (among them, Nurse Edwards) testified it was pneumonia, (and a letter of Mrs. Metz, introduced into evidence, also states the disease was pneumonia) (R. 35, 42, 129). These witnesses, however (and Petitioners' counsel), were repeatedly admonished by the Trial Judge for so characterizing the malady, on the ground that such characterization was hearsay evidence; including in this category the testimony of Mrs. Adams that Dr. Hawfield had told her the Testatrix had pneumonia (R. 42), although Dr. Hawfield was not only a party defendant (who offered himself as his own witness), but was shown to have taken an active part, in conjunction with Mrs. Metz, in the procurement and execution of the will and the power of attorney more particularly referred

to later (R. 160). The Trial Judge also deleted a reference to pneumonia from a proposed hypothetical question for the physician offered by Petitioners as an expert witness (R. 99-101; Tr. 351-369, 468-472), above mentioned.

While the Trial Judge did not specifically instruct the jury to disregard this testimony regarding pneumonia or order it stricken *(nor any of the great amount of evidence he excluded)*, instructing them only generally in his charge that they were not to consider *any evidence rejected or stricken by the Court* (R. 169-170), undoubtedly they understood that they could not regard the Testatrix's illness at that time as anything more serious than the "cold" it was called by Respondents after they had heard the Trial Judge ban the word "pneumonia" (R. 35, 39, 42, 64, 66, 68, 85, 110, 135, 143; Tr. 84, 88, 91, 92, 105, 116, 117, 201, 207, 209, 227, 234, 244, 247, 254, 276, 277, 308, 316, 361, 458, 499, 518, 550, 556). And this even though Dr. Hawfield (barred on statutory grounds from testifying professionally—R. 150), testified on direct examination (R. 151) that prior to this illness he had visited the Testatrix professionally on an average of once a week, and, on cross examination, that from March 17th through March 31st he visited her daily; for the first seven days of April, "every other day; on the third day on the 10th, and after that again on the 14th" (R. 159); and at other points in his testimony that he saw her also on April 13th (R. 152, 153, 162). Bearing on the credibility of the Respondents, on this point as well as all others about which they testified, is a fact of which this Court, it is believed, will take judicial notice (although it apparently carried no weight with the jury): That the legatees, as party defendants, sat within the rail during the entire trial, and were thus enabled, when their turn to testify arrived, to shape their testimony to their advantage.

For many years the Testatrix had owned, and until she became bedridden actively conducted, the 14-room rooming-house which was her home and where she died. In 1932, shortly after the death of Dr. Maitland Ellyson, an unmarried brother who had lived with her (and whose estate the Bank had also handled—R. 76, 77, 88, 132; Tr. 508), she engaged Mrs. Adams, and Mrs. Adams remained continuously in her employ until she was peremptorily discharged by Mrs. Metz on March 20, 1944, and compelled by her to leave the Testatrix's house the following day (R. 39, 113, 118). That, over the twelve-year period, the tie between the Testatrix and Mrs. Adams had been close and affectionate was testified to not only by Mrs. Adams, but by disinterested witnesses for the Petitioners, and even by the Respondents Mrs. Metz and Miss Harvey (R. 54, 65, 108, 133, 136; Tr. 163). Such was the confidence and trust reposed by the Testatrix in Mrs. Adams that, prior to her stroke, she had taken several extended trips, leaving Mrs. Adams in complete control of her rooming-house business and other affairs (R. 39). And, after she became incapacitated to attend to any of her business personally, it was to Mrs. Adams (and not to Mrs. Metz in Arlington) that she entrusted all of it: the management of the rooming-house; the collection of room rents and the buying of supplies out of such funds; the supervision of payment of operating expenses; the necessary transactions with the Bank (R. 38, 39, 78, 83, 84). Mrs. Metz on cross examination testified that in 1940 (R. 131, 132) she had consulted an attorney about obtaining such a power of attorney as she procured on March 31, 1944, to take over control of her aunt's affairs, but was deterred from proceeding with this plan then by the Testatrix herself, who told Mrs. Metz she had everything fixed at the Bank and she need not worry; that her aunt trusted everything to Mrs. Adams and Mr. Hall

(R. 131). Mrs. Metz further testified that the Testatrix "didn't want any of the relatives to meddle in her affairs," (R. 117) and Miss Harvey testified she "never liked anybody to meddle in her affairs," (R. 107).

Throughout her twelve years of service, Mrs. Adams received as pay forty dollars a month and keep; the Testatrix telling her that, instead of increasing her wages, she was providing for her by will. As to this intention of the Testatrix to take care of Mrs. Adams by will, Miss Harvey, as well as Mrs. Adams, testified, and the 1939 and 1941 testamentary papers evidence this intent.

No reasons were given Mrs. Adams for her discharge by Mrs. Metz—just three weeks before the will was executed and while the Testatrix's illness was in its most serious stage —and none but the most trivial were even suggested in testimony, and by only Mrs. Metz and Nurse Scott. *No one but Mrs. Metz testified that the Testatrix had ordered or desired, or ever knew about, the dismissal of Mrs. Adams.* And the testimony of disinterested witnesses (R. 48, 54, 55) indicated most strongly that the Testatrix believed this friend and confidante of long standing had voluntarily deserted her and was bewildered about her doing so. One of these, Elizabeth Allen, a cleaning woman long in the employ of the Testatrix, testified that the feeling between the Testatrix and Mrs. Adams had always been "good feeling, love feeling" (R. 54, 55), and that, after Mrs. Adams left, the Testatrix would send her love to Mrs. Adams by this witness, and repeatedly asked of her "why did she leave."

The Petitioners' witnesses were Mrs. Adams; Ethel Ellyson Pollard; the petitioner Mary Ellyson Dowdy; Hilda May Olson, a grand-niece of the Testatrix, who had known her many years and visited her frequently before

and after she became an invalid, and who, after being reminded by the Trial Judge that she was a legatee in the 1941 will, testified she did not consider the Testatrix competent to make a will after her stroke in 1940 (R. 53); Mrs. F. Iris Amos, a long-time friend who visited the Testatrix often; two of the roomers (one who had lived at the Testatrix's rooming-house thirty-six years), George Thomas and Stephen Day; two of the help: Marcellus Miles, hired to move the Testatrix back and forth from her wheelchair, and Elizabeth Allen, the cleaning woman; and Mr. Hall, the Bank's trust officer. Eight of these witnesses, five disinterested, related incidents and circumstances of their relations with the Testatrix indicating most strongly that her mental faculties had progressively deteriorated after her stroke to the point that, at the time the will and power of attorney were executed, she was in a condition approximating senile dementia—childish; unable to carry on a connected conversation; answered questions merely by "Yes" or "No" or nodding her head, so that it could not be determined whether she understood them; failed to recognize relatives she had known long and well—and all testified in effect that she was incompetent to make a will on April 14, 1944 and incapable of realizing what she was doing if she signed such a paper (R. 42, 46, 47, 48, 49, 52, 53, 57, 63, 66, 91, 92, 93; Tr. 176). Three of these witnesses (two Olson and Dowdy, *named in the 1941 will)* testified that although shortly after her stroke the Testatrix knew them when they visited her, in 1942 and 1943 she no longer recognized them (R. 47, 52, 93); and Mrs. Olson, one of the 1941 legatees, also testified that in 1945 the Testatrix could not remember her even when told her name and relationship (R. 52). Some of these witnesses who had been around the Testatrix daily testified that they had never seen her read after 1940, and two that, some time before

the will was executed, she had told them she had lost the power to read (R. 40, 45, 50, 51, 59).

The only witnesses for the Respondents were the interested parties themselves (the four beneficiaries in the will), Dr. Hawfield (the executor), and the three attesting witnesses. The substance of the testimony of all the Respondents was that the Testatrix, subsequent to her stroke (Mr. Harvey did not see her after Easter of 1941—R. 101, 102), during the severe illness of 1944, and up to her death, was *always mentally alert and bright*, and, in their opinion, fully capable of executing a will on April 14, 1944 (R. 28-38, 101-165). The record discloses that Dr. Hawfield took so active a part in the procurement and execution of both the will and the power of attorney that he too may be classed as an interested party, rather than a mere formal party by reason of his role as executor. Both he and Nurse Scott testified (R. 142-149, 150-165) that the Testatrix had told them, separately, she wanted to make a new will; although Mrs. Metz, the niece to whom (as she testified and the power of attorney indicates) she turned over complete control of her finances and affairs while she was desperately ill, and to whom, therefore, logically, the Testatrix would have communicated this wish—Mrs. Metz testified the Testatrix never mentioned a will to her, but she learned of the Testatrix's desire to make one by overhearing her communicate this desire to Nurse Scott (117, 126, 135). It was Dr. Hawfield who procured, when the Testatrix was so ill that he was visiting her daily professionally, the odd signature "Miss Mollie Ellyson" to the odd power of attorney (R. 138, 177; Tr. 37-39). It was he who, in March, 1944, first contacted Mr. Brick about drawing the will (R. 152). And notwithstanding that, as found by the Circuit Court (R. 186, 187), the Testatrix was recovering from the serious illness when interviewed about the will on April 13th and

when she executed it the following day, and hence did not require the attendance of a physician, he was, by prearrangement with Mr. Brick (R. 152, 153, 166), present at and an active participant in both functions (R. 152, 153, 154, 155, 157, 159, 160, 162, 163). Nurse Edwards testified that he and she held the book on which the Testatrix signed the will (R. 36). *(Where the attesting witnesses signed was not shown.)* He testified (and Mr. Brick in his closing argument corroborated him—R. 166) that it was to him the Testatrix dictated the provisions of the will; and, in connection with the provision for $500 for Nurse Scott (presumably being paid the high salary of a graduate nurse, although the Trial Judge would not permit Petitioners' counsel to inquire as to this—R. 81, 95), that he tried to persuade her to increase the amount of the bequest to this nurse (R. 153, 162), although he disclaimed any personal interest in Nurse Scott (R. 162, 163).

The witnesses assembled to witness the will were not neighbors, or roomers or other inmates of the rooming-house, or anyone who, by reason of long acquaintance, would have known her condition best. A Mrs. Tracy, who succeeded Mrs. Adams as housekeeper (R. 55), was not called to attest the will (nor produced at the trial). The first of the attesting witnesses to testify was Dr. Hawfield's wife who, both he and she testified (R. 28-30, 150-164), happened to be outside the Testatrix's home in their car (although others testified they came in together—R. 30, 33, 36) and so was called in. She had seen the Testatrix but once some months before, did not converse with her when the will was executed, and did not know her condition (R. 28-30). And, *three times*, she testified that *her husband was not present when the will was executed* (R. 28-30), although he and the other two attesting witnesses later testified he *was present* (R. 32, 36, 154, 155, 160). The

second attesting witness to testify (Mrs. McCombs) was a close friend of many years' standing of the lawyer who drafted the will, whom he brought from his office to witness the document (R. 30-33). She had never seen the Testatrix before, had no conversation with her, and had no prior information as to her mental or physical condition. The third attesting witness was Nurse Edwards, whose name appears also on the power of attorney as a witness. Although she, of the three, should have known the Testatrix's condition best, she gave the least positive testimony about it, as well as about the facts of execution (R. 33-38). She had no conversation with the Testatrix on the occasion, either. The Trial Judge excluded questions by Petitioners' counsel concerning when, where and if she signed the power of attorney and as to what she had told counsel about it several months prior to the trial (R. 37). It is very significant that none of these witnesses testified they had signed in the presence of the Testatrix; and from Mrs. Metz's testimony it later appeared that the Testatrix lay in the front of two connecting parlors *"almost like one room"* (R. 115, 140, 141), and so the witnesses could have been grouped in the back parlor and able to observe the Testatrix without her being aware of their presence.

The record discloses that the testimony of these attesting witnesses and Dr. Hawfield as to the facts of execution (though differing materially on other points) was almost word for word, so alike in substance and phraseology as to raise most strongly the inference that they had been coached and were not testifying from memory; and, moreover, it was inherently improbable and contrary to normal experience.

The record discloses that the Trial Judge's unusually active participation in the trial, and his open adverse

criticism of Petitioners' counsel frequently had the effect of disconcerting and confusing both witnesses and counsel (and doubtless also the jury) (Tr. 109, 110, 119, 133, 161, 165, 246, 300, 328, 341); and that many times he aided the Respondents by excluding questions and answers to which their counsel had not objected (Tr. 109, 110, 119, 133, 165).

Much animated colloquy, both at the bench and in the presence of the jury, was occasioned by persistent efforts of Petitioners' to introduce into evidence and inquire into the facts and circumstances surrounding the procurement and execution of, the power of attorney of March 31, 1944; drawn by Mrs. Metz's attorney at the solicitation of herself and Dr. Hawfield (R. 113, 114, 120, 123, 134, 136, 141, 154, 155), and without any contact by this attorney with the Testatrix, as Mr. Brick himself told the jury (R. 166). Petitioners' counsel endeavored to convince the Trial Judge that even the validity of this instrument was a proper subject of inquiry as a circumstance bearing directly on the validity of the will. But the Trial Judge repeatedly ruled out such line of inquiry on the ground that such evidence was *res inter alios acta* (R. 71-73, 79-82, 95, 97, 98, 123, 124, 149; Tr. 295, 298, 353, 481, 482), *and even prohibited Petitioners' counsel from cross-examining fully Mrs. Metz and Dr. Hawfield on the subject when they had testified extensively about it on direct examination* (R. 111, 113, 114, 115, 154). (See *Boosalis v. Crawford*, 69 App. D. C. 141, 99 F. 2d 374.) After Petitioners' counsel had been precluded from introducing the paper for any purpose Mrs. Adams' counsel was permitted to do so for the sole purpose (expressly so limited by the Trial Judge) of impeaching Mrs. Metz on her testimony that she had discharged Mrs. Metz under its authority on March 20th when the paper was dated March 31st (R. 138). On this point Mrs.

Metz had already impeached herself on direct examination (R. 113).

Under the doctrine of *res inter alios acta* the Trial Judge likewise prohibited Petitioners' counsel from introducing into evidence certain checks drawn to the order of the Testatrix and her estate and inquiring into the circumstances surrounding their endorsement and negotiation by Mrs. Metz (R. 149, 164, 165); also, from interrogating the witness Hall concerning the Testatrix's account with the Bank (the records of which he brought into court under subpoena *duces tecum)* and Mrs. Metz's transactions in connection therewith (R. 81, 82, 84).

The Trial Judge very narrowly restricted Petitioners' counsel on direct examination (R. 42, 50, 51, 53, 55, 56, 58, 62-66, 68-75, 81-86, 91, 93-95), and more narrowly on cross examination, *even of the principal party defendants* (R. 36, 37, 108, 120, 123, 124, 127, 128, 130, 131 147, 160, 161).

After the Trial Judge had, at the bench, amended the hypothetical question drafted by Petitioners' counsel for propounding to Dr. Snyder, by deleting therefrom a reference to pneumonia and otherwise changing it (Tr. 468-472), Dr. Snyder was called to the stand on behalf of Petitioners to give his opinion as an expert, in answer to such amended hypothetical question, concerning the Testatrix's mental condition at the time the will was executed. In answer to preliminary qualifying questions, he stated: He held the degrees of Bachelor of Arts and Doctor of Medicine; had been on the medical staff of George Washington University since 1936, except during war service in the Army Medical Corps; was a member of the medical teaching and executive staff of Doctors' Hospital, and associate in Medicine at Garfield Memorial Hospital; was licensed to practice and had practiced medicine in the District of Columbia twelve

years, and had attended patients suffering from paralysis; that his specialty was internal medicine, which included diagnosis and treatment of diseases involving the chest, heart, blood vessels, abdomen and nervous system (R. 99-101). Petitioners' counsel had just commenced a question as to how many cases of paralysis the doctor had treated (and at the bench told the Trial Judge the doctor was an expert on the particular form of paralysis from which the Testatrix was suffering and had handled as many as fifty cases), when, upon objection to his qualifications by Respondents' counsel, the Trial Judge excluded his testimony *in toto*, saying he might be qualified to testify as to the paralysis but not as to its effect on the Testatrix's mental faculties (R. 101; Tr. 368, 369).

On the issue of fraud, withdrawn from the jury, and Petitioners' prayers on the presumptions of undue influence and testamentary incapacity, the following is most significant: (1) The testimony of Mrs. Metz (who, as attorney-in-fact and otherwise, occupied a confidential relationship to the Testatrix) that the Testatrix's reason for becoming "worried" and "dissatisfied" with Mrs. Adams was that the latter had led her to believe "all her money was gone and they were borrowing on her house" (R. 111), and, on cross examination, Mrs. Metz's admission that, after ascertaining that her aunt's belief that the extent of her property had been so greatly reduced was erroneous, *she failed to correct her aunt's wrong belief, and did not know that anyone had done so* (R. 139). (2) Mrs. Metz's position in the Testatrix's home, which afforded her the opportunity to exercise undue influence and fraud, and gave her an advantage over other prior legatees, left out of the will, who were absent and never apprized that a new will was to be executed. (3) The testimony of the witnesses Thomas and Allen (R. 48, 55), concerning questions

asked them by the Testatrix after Mrs. Adams left, from which no other inference could be drawn than that the Testatrix never ordered or knew about the discharge of Mrs. Adams, and was grieving over the separation from her. (4) The fact, *testified to by Mrs. Metz alone,* that the Testatrix asked her to discharge, and did not herself discharge, Mrs. Adams (living under the same roof), together with the further fact, testified to by the Respondents, that the Testatrix was a woman of strong character who did not want her relatives or anyone else to meddle in her affairs (R. 107, 109, 117; Tr. 380). (5) The fact that the Testatrix, while desperately ill, discharged the person most familiar with her affairs; and, further, in order to deprive that person of a share of her estate (as must be inferred from the Respondents' testimony), and without awaiting full recovery from that serious illness, exerted herself about preparations for and execution of a new will—by the roundabout method of enlisting the aid of Dr. Hawfield and Nurse Scott and having it drafted by a strange lawyer (R. 119)—when her purpose could have been effected simply and less arduously by destroying the 1939 codicil and 1941 will, available to her, *though not to the Respondents,* through her bank. (6) The fact that three prior wills, covering a period of some thirteen years —two executed when she was in good health and concededly mentally competent, and the third in the early days of her invalidism—reveal a fixed and definite plan and desire as to the distribution of her property among her relatives, from which the contested will radically departs. (7) The fact that in 1940 (R. 131, 132), when paralysis first struck the Testatrix, Mrs. Metz took steps toward securing a power of attorney and obtaining the same control over the Testatrix and her finances she effected by the power of attorney of 1944, but was prevented from doing so then by the Testatrix herself, then in a better condition

to assert herself (Tr. 380); (8) The testimony of Mrs. Metz and Nurse Scott, that they were not at the Testatrix's home the day the will was executed, but were there the previous day (R. 117, 142, 143, 146, 147), and their further testimony that they did not know when the will was executed (R. 142, 146). (9) The fact that both Mrs. Metz and Dr. Hawfield had tried, unsuccessfully, to get a Mrs. Adkinson to let her name be inserted as attorney-in-fact in the 1944 power of attorney (R. 133, 154).

Most significant, too, is the chronological sequence of the events beginning about the time of the incipience of the Testatrix's serious illness in March, 1944, and when her death was considered imminent (R. 60), and culminating with the execution of the will: Dr. Hawfield contacted Mr. Brick, whom he knew (R. 160), about drawing the will (R. 156). On March 20th Mrs. Metz dismissed Mrs. Adams and the next day evicted her from the Testatrix's home. On March 31st the power of attorney to Mrs. Metz, prepared by her attorney, was executed. Early in April, "after the power of attorney was fixed up" (R. 140), Mrs. Metz (having overheard her aunt tell Nurse Scott she wanted to make a new will) proceeded with Nurse Scott to Mr. Brick's office, where Nurse Scott conveyed the Testatrix's wish to Mr. Brick and Mrs. Metz asked Nurse Scott: "Did she say it of her own free will?" (or "accord") (R. 117, 126). In this connection, Nurse Scott testified she had never talked to anyone but Mrs. Metz about the will (R. 148) and said nothing about having ever been in Mr. Brick's office; and while Mrs. Metz testified that, on that occasion, she had, at Mr. Brick's direction, telephoned Dr. Hawfield about the will (R. 117, 126), Dr. Hawfield testified he had never talked to Mrs. Metz about the will (R. 164).

On April 4th Mrs. Metz wrote a letter to Mrs. Pollard, at the latter's home near Lynchburg, Virginia (R. 129) ask-

ing her to come to Mrs. Metz's home to take care of Mrs. Metz's dying father (R. 120), so that Mrs. Metz could stay at the Testatrix's home "*until things are settled*", and stating she had also written to Miss Harvey. On April 6th Miss Harvey and Mrs. Pollard arrived at the Testatrix's home and were received by Mrs. Metz; who mentioned that, because of changes being made in the household, a new will would have to be made for the Testatrix (R. 87), and who, while permitting Miss Harvey to see the Testatrix that evening, did not allow Mrs. Pollard to visit her until the next morning, and for only five minutes (R. 85, 115, 127). About the date of execution of the will, Mrs. Pollard heard Mrs. Metz tell someone, over the telephone from Mrs. Metz's home, that she wasn't coming, but she wanted to be included in the will and desired that Nurse Scott be also remembered (R. 89, 90, 92); Mrs. Pollard further testifying that Mrs. Metz, upon turning from the telephone and observing her, said that "Scott" had called, and the doctor and the lawyer were drawing the Testatrix's will (R. 92). *This conversation was not explained by Mrs. Metz on the stand, but positively denied* (R. 116, 121).

The testimony of Mrs. Metz, Dr. Hawfield and Nurse Scott, taken together, comprises such inconsistencies, contradictions and improbabilities as to raise no other reasonable inference than that the Testatrix never expressed or entertained a desire to make a new will, and the contested paper embodied the wishes of those Respondents and was the result of their joint activities. And the verdict of the jury, in view of the evidence, leads to the conclusion that they were misled by the Trial Judge's charge and the argument of Respondents' counsel (Tr. 614, 627) into weighing the relative interests of the Petitioners and Respondents in prior wills and deciding the question on that basis, rather than to decide the sole question before them: *Was it the*

will of Mary Elizabeth Ellyson? And that, being unable to determine the merits of the controversy, they solved their difficulty by bringing in a verdict maintaining the *status quo.*

Although not all the wills were read to the jury, and, as the Trial Judge stated they could not have grasped their full import if they had been, without further study, he refused to permit them to take any of the exhibits to the jury room (R. 43, 175), notwithstanding the fixed plan of the Testatrix evidenced by the prior wills.

On their appeal to the Circuit Court, the Petitioners assigned as errors, and argued, the following: I. Denial of their Prayers Nos. 2 and 7 on the presumptions of undue influence and testamentary incapacity, respectively. II. Direction of a verdict on the issue of fraud. III. Disqualification as an expert and exclusion of the testimony of Dr. Snyder. IV. The Trial Judge's ruling that Nurses Scott and Edwards were not competent to testify to the nature of the disease from which the Testatrix was suffering on the date of the will (R. 99, 143). V. That the verdict was contrary to the weight of the evidence and the law. VI. That the trial judge misled and confused the jury by an inadequate, and, in parts, ambiguous charge (R. 167-175). VII. The exclusion by the Trial Judge of testimony and other evidence, material, relevant and pertinent to Petitioners' case, in: (1) Prohibiting Respondents' counsel from: (a) Inquiring into the facts and circumstances surrounding the procurement and execution of the power of attorney of March 31, 1944 (R. 37, 79-83, 112-115, 120, 123, 124, 137, 138, 149, 159, 160); (b) Putting into evidence and examining into the facts concerning the account of the Testatrix with the Bank (R. 79-83, 149, 164, 165); (c) Putting into evidence and inquiring into the facts surrounding

certain checks endorsed in the name of the Testatrix and her estate by Mrs. Metz. (2) The exclusion of certain testimony of the witnesses Adams (R. 42), Thomas (R. 50, 51), Olson (R. 53), Allen (R. 55, 56, 58), Miles (R. 62, 63), Day (R. 64-66, 68-70, 73-75), Hall (R. 81-84), Pollard (R. 86, 91), and Dowdy (R. 93-95). VIII. That Petitioners were deprived of the right to cross-examine properly and fully the witnesses Edwards (R. 36, 37), Miss Harvey (R. 108), Metz (R. 120, 123, 124, 127, 128, 130, 131), Scott (R. 147), and Dr. Hawfield (R. 160, 161). IX. Other errors of the Trial Judge, in: (a) Refusing to withdraw a juror and declare a mistrial (R. 161); (b) Failing to take proper action concerning improper argument of Respondents' counsel objected to by Petitioners' counsel (R. 166); (c) Making comments prejudicial to Petitioners in front of the jury. That due attestation of the will was not proved, in that the attesting witnesses did not testify they signed in the presence of the Testatrix. That by the Trial Judge's conduct of the case the Petitioners were prevented from fully developing their case and deprived of a fair and impartial trial.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938), 28 U. S. C. A., Section 347; and Rule 38 of this Court.

Questions Presented.

I. Whether or not the Circuit Court erred in ruling that the Trial Judge did not err in denying Petitioners' Prayers Nos. 2 and 7, on the presumptions of fact of undue influence and testamentary incapacity, respectively (R.

18-22, 187, 188); and in ruling also that this point could not be urged on appeal because Petitioners had taken no exception to the Trial Judge's charge on the issues of undue influence and testamentary capacity (R. 188).

II. Whether or not the Circuit Court erred in ruling that the Trial Judge did not err in directing a verdict on Issue No. 3 (Fraud and Deceit—R. 188); and in confining its examination of the record, upon this point, to only "*the portions of the evidence*" specifically called to its attention by Petitioners.

III. Whether or not the Circuit Court erred in ruling that the Trial Judge did not err in disqualifying as an expert on mental capacity, and excluding the testimony of, Dr. Luther H. Snyder, a physician; and in holding, on this point, that a trial judge has the same discretion in determining the competency of a physician as an expert witness as he has in the case of a layman as such, and that the Trial Judge in the instant case did not abuse his discretion (R. 188, 189).

IV. Whether or not the Circuit Court erred in ruling that the Trial Judge's charge (R. 167-175) was not misleading and, in part, ambiguous, because couched in terms perhaps proper for a legal opinion, but tending to confuse a jury of various degrees of intelligence and education, as Petitioners contended; and in finding that the Trial Judge was, on the contrary, "extraordinarily careful in instructing the jury in the most elementary language" (R. 189).

V. Whether or not the Circuit Court erred in failing to find and hold that the Trial Judge erred in his exclusion of testimony and other evidence: (1) Excluding certain testimony of witnesses Mrs. Adams (R. 42); Thomas

(R. 50, 51); Olson (R. 53); Allen (R. 55, 56, 58); Miles (R. 62, 63); Day (R. 64, 65, 66, 68-75); Hall (R. 79-84); Pollard (R. 86, 91) and Dowdy (R. 93-95). (2) Prohibiting Petitioners' counsel from (a) inquiring into the facts and circumstances surrounding the procurement and execution of the power of attorney of March 31, 1944, from the Testatrix to Mrs. Metz; (b) putting into evidence and examining into the facts concerning the trust account of the Testatrix with the Bank; (c) putting into evidence and inquiring into the facts surrounding certain checks endorsed in the name of the Testatrix and her estate by Mrs. Metz (R. 37, 56, 71-73, 78-83, 97-99, 112-115, 119-124, 133-138, 140, 149, 154, 159, 160, 164, 165).

VI. Whether or not the Circuit Court erred in failing to find and hold that the Trial Judge erred in his limitations and curtailment of cross examination, and deprived Petitioners of their fundamental right to properly and fully cross-examine the witnesses Nurse Edwards (R. 36, 37), Miss Harvey (R. 108), Mrs. Metz (R. 120, 123, 124, 127, 128, 130, 131), Nurse Scott (R. 147) and Dr. Hawfield (R. 160, 161).

VII. Whether or not the Circuit Court erred in failing to rule specifically upon the point, and in failing to find that the Trial Judge erred in prohibiting the Nurses Scott and Edwards from testifying as to the nature of the disease from which the Testatrix was suffering in March and April of 1944 (R. 99, 143).

VIII. Whether or not the Circuit Court erred in failing to find that the Trial Judge denied Petitioners a fair and impartial trial in (1) telling the jury why Dr. Hawfield could not testify as a physician (R. 150); (2) refusing to withdraw a juror and declare a mistrial after criticizing Petitioners' counsel in the presence of the jury (R. 161);

(3) failing to take proper preventative measures when Respondents' counsel testified in his closing argument (R. 166); (4) assuming the role of counsel for Respondents (R. 37, 41, 42, 62, 65, 83, 120, 121, 123, 125, 131, 161, 163; Tr. 109, 110, 165, 324); (5) reprimanding counsel for Petitioners in the presence of the jury (Tr. 324) during the trial, and for characterizing the testimony of witnesses in his closing argument (Tr. 663); (6) denying Petitioners' motion for a new trial summarily, and the request of their counsel for an oral hearing thereof in order to present newly-discovered law (R. 27).

IX. Whether or not the Circuit Court erred in failing to find that due attestation of the will was not proved (R. 189).

X. Whether or not the Circuit Court erred in failing to find and hold that the Trial Judge denied Petitioners a fair trial and due process of law.

XI. Whether or not the Circuit Court, in affirming the judgment of the Trial Court, sanctioned such a departure by the Trial Court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

XII. Whether or not the Circuit Court's opinion, in form and substance, is so far a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Reasons Relied on for Allowance of Writ.

I. In ruling on Petitioners' contention that the Trial Judge erroneously denied Petitioners' Prayers Nos. 2 and 7, on the presumptions of undue influence and testamentary incapacity, respectively, the Circuit Court's opin-

ion states that, whether or not the prayers correctly stated the law, it was not error to deny them, because, in his charge, the Trial Judge correctly stated the law on *the issues of "undue influence and testamentary capacity"* (R. 187). This ruling must mean either that the Circuit Court now holds that in this jurisdiction the uncontradicted facts of record such as have been previously held here, and are generally held elsewhere, to raise such presumptions, do not raise them; or else that the presumptions *were raised,* but the Trial Judge's charge covered them. Under either interpretation of the ruling, the Circuit Court is in error, and thus the ruling calls for the exercise of this Court's supervisory authority over the lower Federal Courts. If the ruling is construed to hold that the Trial Judge did not err in denying these prayers and failing to instruct the jury in line with them, it is in conflict with decisions of this Court, with prior decisions of that Court, and decisions of other Circuit Courts; and contrary to the great weight of opinion of recognized text-writers and the decisions of State Courts.

(1) Prayer No. 2 (R. 18-20): Petitioners' contention that, under the special uncontradicted facts, conditions and circumstances of record, a presumption that undue influence was exerted upon the Testatrix by Mrs. Metz and Nurse Scott, that the jury should have been so instructed, and that the Trial Judge erred in denying this prayer, is supported by: *Hagerty v. Olmstead, supra; Barbour v. Moore,* 4 App. D. C. 550, and 10 App. D. C. 30; *McMillan v. Knost,* 75 U. S. App. D. C. 26, 126 F. 2d 235; *Towson v. Moore,* 11 App. D. C. 377, and 173 U. S. 17; *Mackall v. Mackall,* 135 U. S. 167; *Conley v. Nailor,* 118 U. S. 127; *Shapiro v. Rubens* (C. C. A.-7, 1948), 166 F. 2d 659; 57 *Am. Jur.,* Secs. 371, 386, 387, 389, 390, 392, pp. 270, 271, 279, 280, 281, 283; 28 L. R. A. (NS 1910), 272 *et seq.;* 66

A. L. R., 228 *et seq.;* 154 A. L. R., 573 *et seq.* The facts set out in the opinion (R. 186), moreover, describe Mrs. Metz merely as "*a niece of the testatrix and one of present appellees,*" omitting the further material, uncontradicted facts bearing on this presumption, that Mrs. Metz was also a substantial legatee in the will; had full control of the Testatrix's person and finances by virtue of a power of attorney constituting her attorney-in-fact (and so unquestionably held a position of confidential relationship—R. 191-201); her attorney drew the will; and she was active in its procurement.

(2) Prayer No. 7 (R. 21, 22): The Trial Judge's denial of this prayer, and his failure to instruct the jury according to its tenor, is contrary to established law that, where a continuing condition is shown to exist, it is presumed to continue until the contrary is shown to the satisfaction of the jury. There was testimony by several disinterested witnesses that the Testatrix was incompetent to transact business immediately before and after the date of execution of the will. If the Circuit Court's ruling means that the Trial Judge committed no error in denying this prayer, the ruling is in conflict with the ruling of this Court in *Ralston v. Turpin, supra,* cited in *Doyle v. Rody,* appearing at the bottom of the prayer; also, *Mt. Vernon Hotel Co.* v. *Black,* 157 F. 2d 637; 31 C. J. S., Secs. 124, pp. 736 *et seq.,* and 68 C. J. Sec. 455, p. 764; 28 L. R. A. (NS 1910), 270 *et seq.* Cf. MacCartney case, cited in Circuit Court's opinion, and *Thomas v. Young,* 57 App. D. C. 282. As to *Doyle v. Rody, supra,* a Maryland case, Maryland law on probate proceedings and practice has always been considered controlling in the District of Columbia. *Pascucci v. Alsop* (1945), 79 U. S. App. D. C. 354; *Clawans v. Sheetz,* 67 App. D. C. 366, 92 F. 2d 517. Cf. *Redford v. Booker,* 185 S. E. 879 (1936).

(3) If the statement in the Circuit Court's ruling on the prayers, that "the ultimate charge properly informed the jury as to the law * * * *on these points*" (R. 188), means that the charge informed the jury as to these presumptions, here, too, the Circuit Court is in error; because nowhere in the Trial Judge's charge are there any instructions on these presumptions. Hence, the *MacCartney* case does not support this ruling. That case, however, does support Petitioners on many points.

(4) On the prayers, the Circuit Court's opinion further states that, since no exceptions were taken by Petitioners to the Trial Judge's charge, they could not urge their contentions concerning these prayers before that Court. As the record shows, the typed prayers, with appended authorities, were submitted and argued at the bench, and denied, prior to final arguments of counsel and the charging of the jury. It must be assumed that the Circuit Court had in mind Rule 51 (FRCP); and so this ruling is directly in conflict with recent, applicable decisions of the 6th and 8th Federal Circuits (R. 201, 202), namely: *Williams v. Powers* (C.C.A-6,1943), 135 F. 2d 153; and *Hower v. Roberts* (C. C. A.-8, 1946), 153 F. 2d 726, citing the Williams case. Both cases hold that Rules 46 and 51 (FRCP) should be read together, and that if the points urged were called to the attention of the Trial Judge, that is sufficient, and no exceptions or objections are required. Cf. *Hormel v. Helvering*, 312 U. S. 552, wherein, at p. 557, this Court said: "*Rules of practice and procedure are devised to promote the ends of justice, not to defeat them.*" This Circuit Court now being on the same basis as other Federal Circuit Courts, the conflicting rulings of these Circuit Courts on the construction and application of these highly important Federal rules of civil procedure, governing exceptions and objections, raise a question which this

Court should decide, in the interest of securing uniformity throughout the Circuits thereon; *particularly so, since Rule 46 marks a radical change from long-established rules making exceptions and objections obligatory.* In *Hickman v. Taylor*, 329 U. S. 459, this Court took jurisdiction to construe the Federal rules governing discovery.

II. The Circuit Court erred in ruling that the Trial Judge properly directed a verdict on the issue of fraud and deceit (R. 188). Under the facts in this case, this ruling is contrary to well-established law. In effect, it approves the denial to Petitioners of their fundamental right to trial by jury on this issue. Moreover, the Trial Judge, in withdrawing this issue from the jury, deprived Petitioners of a fair trial and due process of law; and the Circuit Court's ruling sanctioning the Trial Court's action calls for the exercise of this Court's power of supervision over the lower Federal Courts. In directing a verdict, the Trial Judge here passed on all facts and circumstantial evidence, and the inferences properly to be drawn therefrom, and the weight thereof. This, under law, he could not do. Not only was there substantial evidence of fraud, as is specifically pointed out in Petitioners' Statement, but there was a combination of special uncontradicted facts and circumstances which raised a presumption of fraud. Hence, it was an issue for the jury under a proper charge, according to applicable law. *Too, under the special facts, the issues of fraud and undue influence could not be separated. If either issue went to the jury, the other could not be withdrawn.* The facts which bore on undue influence, and raised a presumption of undue influence, were of a fraudulent character, and hence pointed as strongly to fraud and a presumption of fraud. *Duckett v. Duckett*, 134 F. 2d 527, 77 U. S. App. D. C. 303; *Frene v. Muratori*, 142 F. 2d 768; *Hagerty v. Olmstead, Towson v.*

Moore, McMillan v. Knost, Barbour v. Moore, Conley v. Nailor, Mackall v. Mackall, supra; 57 *Am. Jur.*, Secs. 386, 387, p. 279; 28 L. R. A. (N. S. 1910), 274, 275, 279 *et seq.*; 66 A. L. R., 228 *et seq.*; 154 A. L. R., 573 *et seq.*

The presumption of fraud, too, as well as the presumptions of undue influence and testamentary incapacity, was a presumption of fact; and when these presumptions were raised by the evidence, the burden was thrown upon the Respondents of overcoming them by showing, to the satisfaction of the jury, by clear and convincing evidence, that the Testatrix had testamentary capacity when she executed the will, and that no fraud or undue influence were exercised upon her; that no undue advantage was taken of her; that she exercised understanding and judgment when she revoked all prior testamentary papers and eliminated from a share in her estate some ~~[illegible]~~ beneficiaries previously named (representing the various branches of her family), and, for no reason shown, divided her estate among three (representing two branches). The Trial Court, therefore, erred in instructing the jury (R. 171) that the burden of proof throughout was on the Petitioners.

The recognized test as to the right of a Trial Judge to direct a verdict is: If the issue had been submitted to the jury, under a proper charge, and they had brought in a verdict on it for the Petitioners, would it have been the duty of the Trial Judge, after considering all the facts and the inferences to be gleaned from circumstantial evidence in the light most favorable to Petitioners, to set the verdict aside?

On this point, the Circuit Court said further, that "the trial judge has decided and we agree, after consideration of *all the portions of the evidence* called to our attention

by appellants, that there was no evidence of fraud sufficient to justify submission of that issue to the jury." Since the phrase "*portions of the evidence*" must refer to facts emphasized in Petitioners' brief to the Circuit Court as pointing to fraud, it appears that that Court did not read *the entire record*, as the law mandatorily requires be done, before ruling on this issue. *28 U. S. C. A. 391.* In the *MacCartney* case, *supra*, it is said that *the record was carefully read;* most opinions on the direction of a verdict so state; and the law is construed in *Banning v. U. S.* (C. C. A.-6, 1942), 130 F. 2d 330 (Cert. den. 317 U. S. 695); *Beyer v. LeFevre*, 186 U. S. 114; *McCandless v. U. S.*, 298 U. S. 342.

Cf. *Shapiro v. Rubens, supra; Worcester v. Pure Torpedo Co.*, 140 F. 2d 358; *Irish v. Central Vt. Ry., Inc.* (C. C. A.-2, 1947), 164 F. 2d 837; *Conn. Mut. Life Ins. Co. v. Lathrop*, 111 U. S. 612; *Ralston v. Turpin, supra; Railway Express Co. v. Mallory*, 168 F. 2d 426; *Katz v. Del. H. & R. Corp., supra; Scott v. U. S.* (C. C. A.-6, 1947), 161 F. 2d 1009; *Lumbra v. U. S.* (1933), 290 U. S. 550; *Albany Ins. Co. v. Halberg* (C. C. A.-8), 166 F. 2d 311; *Wash. Term. Co. v. Martin*, 167 F. 2d 762; *Kemper v. Churchill*, 8 Wall. 362; *Bowden v. Johnson*, 107 U. S. 251; *The Struggle v. U. S.*, 9 Cranch. 71; *Clark's Exrs. v. Reinsdyk*, 9 Cranch. 153; *The Robert Edwards*, 6 Wheat. 187; *La Nareyda*, 8 Wheat. 108; *Obold v. Obold*, 82 U. S. App. D. C. 268, 163 F. 2d 32.

It is submitted that the circumstantial evidence in this case, coupled with the special combination of circumstances and uncontradicted facts, speaks louder and more convincingly than the testimony of interested witnesses to prove that fraud was exercised to effect the execution of the will. As far back as John Marshall's day this was recognized where fraud was concerned.

The *MacCartney* case, cited in the Circuit Court's opinion to support its conclusions, is not applicable for the purpose, but strongly supports Petitioners. For that case definitely holds that a trial judge has no power to weigh evidence; that the weight of all facts and circumstantial evidence, and the inferences to be derived therefrom, is a matter for the jury's determination. The Circuit Court erred, therefore, in not ruling that the issue of fraud should have been submitted to the jury, under proper instructions as to the law applicable to the particular facts. *Thompson v. Smith*, 103 F. 2d 936, 28 A. L. R. 790; *Mut. Res. Life Ins. Co. v. Heidel* (C. C. A.-8, 1948), 161 F. 2d 533; *Kansas City Southern Co. v. Albers*, 223 U. S. 573; *Hennister v. Starnthrop*, 2 Wall. 106; 31 C. J. S., Sec. 127, p. 747. The Circuit Court's ruling on this point is also in conflict with the following decisions: *Md. Cas. Co. v. Hosmer* (C. C. A., Mass., 1938), 93 F. 2d 365; *Equit. Life Ins. Co. v. Guion* (C. C. A., Neb., 1937), 86 F. 2d 865; *Flynn v. Crume*, 101 F. 2d 661; *A & P Tea Co. v. Robards*, 161 F. 2d 929. Cf. *Heatherly v. Southern Ry. Co.* (C. C. A.-5, 1939), 106 F. 2d 894; *McGraw & Co. v. Milcor Steel Co.* (C. C. A.-2, 1945), 149 F. 2d 301; *Robins v. Pitcairn* (C. C. A., Ill., 1942), 124 F. 2d 734; *Stansbury v. Travelers Prot. Assn.* (C. C. A., Tex., 1936), 80 F. 2d 997; *Scott v. U. S.* (C. C. A.-6, 1947), 161 F. 2d 1009.

III. In holding it to be a matter for the Trial Judge's discretion whether or not Dr. Snyder, a practicing physician, with experience in the treatment of paralysis cases, was qualified to give an expert opinion, in answer to a hypothetical question, as to the effect on the Testatrix's mental faculties of long-continued paralysis, extreme old age, and the toxemic condition produced by pneumonia (R. 99-101), and in ruling that the Trial Judge did not

abuse his discretion in disqualifying Dr. Snyder and excluding his testimony (R. 188, 189), the Circuit Court erred, and its ruling is in conflict with the great weight of opinion on the point, including the majority of State courts of last resort and recognized text-writers.

It is submitted that the question here raised is one of such general importance as to call for a decision by this Court: First, whether a trial court has discretion in such a situation as to the competency of a physician as an expert, or whether, in line with the majority view, he has no discretion, and should admit the testimony, leaving its weight, under proper instructions, to be determined by the jury. Second, if a trial judge has discretion in such case, whether in the instant case the Trial Judge abused his discretion. The Trial Judge's ruling here is in conflict with principles enunciated in *Hamilton v. U. S.*, 26 App. D. C. 382; *Conn. Mut. Life Ins. Co. v. Lathrop, supra; Mut. Ben. Health & Ac. Assn. v. Francois*, 148 F. 2d 590; *Boston Ins. Co. v. Read*, 166 F. 2d 551; *Beck v. Wing's Field* (C. C. A.-3, 1941), 122 F. 2d 114; *Leach v. Burr*, 188 U. S. 510; and with the views expressed in 39 L. R. A. 305 *et seq.*; *1 Clevenger Med. Jur.*, 546; 20 *Am. Jur.*, Secs. 785, 851, 864, 865, pp. 659, 713, 726, 727; 54 A. L. R. 863 (anno. to *Pridgen* case, which gives the general rule and cites in support the works on Evidence of Rogers, Lawson and Greenleaf); *3 Wigmore, Evidence* (3rd ed., 1940), Sec. 687, p. 3; Sec. 569, p. 665, where the author comments that the Massachusetts rule (in the minority class of about three States, including Maine), that a physician who is not a mental specialist may qualify as an expert only if he has had the person inquired about under his personal observation, is an "odd" rule; 32 C. J. S., Sec. 573, p. 266; *Doyle v. Rody, supra.*

The *Chessin* and *Hannan* cases, cited in the Circuit Court's opinion in support of its ruling on this point, have no application whatsoever to this situation. In those cases the witnesses offered as experts were not physicians or medical men, called to testify as experts on subjects within the purview of their education and experience, but laymen. It is conceded that in the case of a layman the trial judge has discretion to decide whether he has the superior knowledge on the particular subject to constitute him an expert.

It will be noted, also, that the Trial Judge here did not "limit" Dr. Snyder's testimony, as the opinion states, but excluded it *in toto*. And, while it is true that, at the trial, the Trial Judge asked for authority on the subject, which counsel at the time was unprepared to furnish, the record discloses (R. 26, 27) that when he summarily denied Petitioners' motion for a new trial, he also denied the request for an oral hearing, at which such authority, which counsel had obtained, could have been given him.

It is respectfully urged that this Court take cognizance of this question, for the fundamental reason that, where alienists or other so-called specialists on mental disorders enjoy a monopoly in this field their fees for testifying are so exorbitant as to be beyond the reach of litigants of moderate means.

IV. On Petitioners' contention that the Trial Judge's charge (R. 167-175) was inadequate, and also ambiguous because parts of it were "couched in terms proper for a legal opinion perhaps, but certainly not likely" to be understood by "every layman on the jury, of various degrees of intelligence and education," the Circuit Court found that the charge was proper and that "the trial judge was extraordinarily careful in instructing the jury in the most ele-

mentary language * * *." (R. 189). It is submitted that a charge taken almost literally from appellate decisions was improper, and that the charge in this case was too general in character, and also, in effect, the direction of a verdict for Respondents. A general charge is not sufficient; it must be fitted to the specific facts of the particular case. *Thompson v. Smith, supra; Coleman v. Heurich*, 2 Mackey (13 D. C.) 189; *Barbour v. Moore, Towson v. Moore, Mackall v. Mackall, supra; Cochrane v. U. S.*, 157 U. S. 286; *Coffin v. U. S.*, 156 U. S. 432; *Rea v. Missouri*, 84 U. S. (17 Wall.) 532.

It is submitted, further, that the jury could not possibly have received from the Trial Judge's charge the clear guidance and illumination necessary to enable them properly to draw a correct conclusion from the particular combination of special facts in this case. Inadequate directions to a jury which do not cover the law applicable to the specific facts of a case are fatal.

We submit that the Circuit Court's holding is in conflict with the following authorities: *Ralston v. Turpin, Doyle v. Rody, Conley v. Nailor, Barbour v. Moore* and *Shapiro v. Rubens, supra.* Cf. *Lauer's Est.*, 351 Pa. 438, 41 A. 2d 552; *In Re Bridle's Est.* (Sup. Ct. Pa., 1948), 60 A. 2d 1; *Pusey's Est.*, 321 Pa. 268; *Lane's Will*, 352 Pa. 323; *Woerner, Am. Law of Adm.* (3rd ed., 1923), Sec. 32, p. 63 *et seq.; Underhill, Law of Wills* (1900), Sec. 145, p. 207 *et seq.*; 207 *et seq.* 28 L. R. A. (NS 1910), 270 *et seq.*; 66 A. L. R., 228 *et seq.*; 154 A. L. R., 573 *et seq.*; 167 A. L. R., 1 *et seq.*; 57 *Am. Jur.*, Secs. 386, 387, p. 279 (majority opinion); also, Secs. 390, 392, pp. 281, 283 (as to activity, etc. in procuring execution of will). See, also, 28 A. L. R. 790 (anno.), *Dowell, Inc. v. Jowers* (CCA-5, 1948), 166 F. 2d 214; 31 C. J. S., Sec. 124, p. 736 *et seq.*; 68 C. J., Sec. 455

(prior wills); *Turner v. American Sec. & Tr. Co.* (1909), 213 U. S. 257; *Thomas v. Young*, 22 F. 2d 588; 57 App. D. C. 282.

V. On Petitioners' contentions that the Trial Judge excluded evidence and testimony material, pertinent and relevant to their case (R. 37, 42, 50-53, 55, 58, 62-75, 78-84, 86, 91, 93-95, 97-99, 112-115, 119-124, 133-137, 140, 149, 160, 164, 165), the Circuit Court declined to pass specifically sweeping aside these contentions and the equally important one that the Trial Court unduly and unreasonably restricted and curtailed them on cross examination, with the pronouncement (R. 189) that they were "without merit" and lacked "real substance". In thus restricting the evidence, the Trial Judge prevented Petitioners from fully and properly developing their case, and denied them their constitutional right to a fair trial and due process of law. And the Circuit Court, in ignoring these contentions, and in failing to hold that the Trial Judge erred in this respect, has so far sanctioned a departure by the lower court from the accepted and usual course of judicial proceedings, and so far itself departed therefrom, as to call for an exercise of this Court's power of supervision. The Trial Judge's rulings on these points were not only contrary to the rules governing the admission of evidence in ordinary civil cases, but particularly in conflict with applicable decisions governing will cases. It is universally held that in a will contest the greatest latitude should be exercised by the trial judge in the admission of evidence, for the reason that such a case is in the nature of an inquiry to determine the wishes of the one who would be best able to testify thereto were his lips not sealed in death.

The blanket ruling of the Circuit Court holding to be correct the rulings of the Trial Judge excluding certain evidence, objected to under specific points raised by Peti-

tioners, is in conflict with *Olmstead v. Webb*, 5 App. D. C. 38 (and cases cited therein); *Hagerty v. Olmstead, Barbour v. Moore, Towson v. Moore, supra; Wilson v. Beckett*, 103 F. 2d 19, 79 U. S. App. D. C. 94; Rule 43 (FRCP); *Hyland v. Miller Natl. Ins. Co.*, 58 F. 2d 1003; *Majestic v. L. & N. R. Co.* (CCA, Tenn., 1945), 147 F. 2d 621; *Manourikos v. Vardianos*, 169 F. 2d 53; *Holmes v. Goldsmith*, 147 U. S. 150; *Wood v. U. S.*, 16 Pet. 342; *Thieda v. Utah*, 159 U. S. 510; *Castle v. Bullard*, 23 How. 172; *Hoffman v. Palmer*, 129 F. 2d 976; *Worthington v. U. S.* (1933), 64 F. 2d 936; *Rea v. Missouri, supra; Ormsby v. Webb*, 134 U. S. 47; *Tombigbee Lbr. Co. v. Hollingsworth*, 162 F. 2d 763; *Boosalis v. Crawford, Obold v. Obold, Clawans v. Sheetz, Pascucci v. Alsop, Mackall v. Mackall, Wilson v. Beckett, supra; Owl Creek Coal Co. v. Golcb* (CCA-8, 1914), 210 F. 2d 209; *Garrison v. U. S.*, 62 F. 2d 41; *Miller v. Continental Shipbuilding Corp.*, 265 F. 2d 158; *Alderman v. U. S.*, 31 F. 2d 499, Cf. *Lavengood v. Lavengood*, 73 N. E. 2d 685; *In Re Lomax's Will*, 39 S. E. 2d 388, 226 N. C. 498; *In Re Lewis's Estate;* 149 P. 2d [illegible]; *In Re George's Estate*, 15 N. W. 2d 80; *In Re Hampton's Estate*, 131 P. 2d 565; *In Re Wolleb's Estate*, 132 P. 2d 864; *In Re Perry's Estate*, 181 P. 2d 783; *In Re Bucher's Estate*, 120 P. 2d 44.

VI. The Trial Judge denied Petitioners their constitutional right to a fair trial in refusing to allow them to fully, adequately and reasonably cross-examine the Respondents and their witness Nurse Edwards (R. 36, 37, 108, 120, 123-131, 147, 160, 161). The Circuit Court, in its blanket statement holding Petitioners' contentions which included this point to be without merit, is in conflict with applicable decisions not only of that Court, but of other Circuit Courts and this Court. See *Radio Cab, Inc., v. Houser* (1942), 128 F. 2d 604, 76 U. S. App. D. C. 35; *Hanger, Inc., v. U. S.*, 160 F. 2d 8; *Rea v. Missouri, supra; Alford v. U. S.*, 282

U. S. 687; *Kroger Groc. & Bkg. Co. v. Stewart,* 164 F. 2d 884; *Lindsay v. U. S.,* 133 F. 2d 368, 77 U. S. App. D. C. 1; *Heard v. U. S.,* 255 F. 289; *Cossack v. U. S.,* 63 F. 2d 511; *Hyland v. Miller Ins. Co., supra; Gerber v. U. S.,* 145 F. 2d 966; *Miner v. U. S.,* 57 F. 2d 506; *Sunderland v. U. S., Banning v. U. S., supra; Cleveland v. Peters* (1947), 73 F. S. 769; *U. S. v. Edmonds,* 63 F. S. 968 (citing Alford case); *Majestic v. L & N. R. Co., supra; Zumwalt v. Gardner,* (CCA-8, 1947), 160 F. 2d 298.

The *Lindsay, Cossack* and *Hanger* cases, *supra,* hold that full cross examinations must be allowed on subjects of direct examination, and that not to do so is prejudicial error. See, also, *Miller v. Continental Shipbuilding Corp.; Aldermen v. U. S.;* 70 C. J. 828, p. 669 *et seq.* The Respondents Harvey, Metz, Scott and Hawfield offered themselves as their own witnesses; yet the Trial Judge narrowly restricted Petitioners' counsel in cross-examining even these witnesses. The law is that even greater than ordinary latitude should be allowed in the cross examination of a party taking the stand in his own behalf. *Rea v. Missouri* and *Kroger Groc. & Bkg. Co. v. Stewart, supra.* Cf. *People v. Callop,* (1945), 161 P. 2d 576.

VII. In its blanket ruling, the Circuit Court held to be without merit Petitioners' contention that the Trial Judge erred in ruling that Nurses Scott and Edwards could not testify as to the nature of the disease from which the Testatrix was suffering in March and April, 1944 (R. 99, 143). This ruling is in conflict with applicable decisions of that Court and other Circuit Courts. *Southwest Metals Co. v. Gomez,* 4 F. 2d 215; *First Tr. Co. of St. Paul v. K. C. Life Ins. Co.,* 79 F. 2d 148; *Eureka-Md. Assur. Co. v. Gray,* 74 App. D. C. 191, 121 F. 2d 104. Cf. *Prudential Ins. Co. v. Kozlowski,* 276 N. W. 300, in which there is a full discus-

sion, pro and con, of the subject matter, and in which the Federal rule is followed. Regardless of the question of privilege, moreover, these nurses or anyone else who heard Dr. Hawfield diagnose the disease could testify as to his diagnosis, since such testimony was not hearsay. Dr. Hawfield was a defendant in this case. His diagnosis of the disease as pneumonia was admissible, moreover, on the ground that it was against interest, since it tended to impeach his testimony as to the mental alertness of the Testatrix at the date of the execution of the will (R. 153, 155, 164). See 20 *Am. Jur.* (Evidence), Sec. 454; 104 A. L. R. 1130 (anno.); *Davis v. Calvert*, 5 G. & J. (Md.), 269 (cited *in Olmstead v. Webb, supra). Cf. Spitler v. Atchinson, T. & S. F. R. Co.*, 253 U. S. 117.

VIII. Even a casual examination of the record discloses the following additional support for Petitioners' contention that they were denied a fair and impartial trial: (1) With no protective measures taken by the Trial Judge upon objection by Petitioners' counsel, other than the admonition to confine himself to the evidence, Respondents' counsel testified in his own behalf in his argument to the jury (R. 166) (*Katz v. Del. H. & R. Corp., supra*). (2) The Trial Judge frequently assumed the role of counsel for the Respondents and excluded questions and answers to which Respondents' counsel made no objection. He made many remarks prejudicial to Petitioners before the jury, and displayed bias and prejudice against Petitioners throughout the trial. He made a statement to the jury as to why Dr. Hawfield could not testify professionally (R. 150). (3) He refused Petitioners' request that the jury be permitted to take the exhibits to the jury-room with them to aid them in their deliberations. (4) He refused to allow caveators' two counsel (who did not represent the same caveators) more than one hour between them for argu-

ment, in which to cover the large amount of evidence developed in five full days of trial (some 700 pp. of transcript). See 53 *Am. Jur.* (Trial), Secs. 74, 76, 93, pp. 73, 75, 84; 3 *Am. Jur.*, Secs. 926, 1073, pp. 493, 613; *Sprinkle v. Davis*, 111 F. 2d 1925, 128 A. L. R. 1101 (Cert. den. 314 U. S. 647). Cf. *Pittsburgh Steamboat Co. v. National Labor Relations Bd.* (CCA-6, 1948), 167 F. 2d 126; *Mutual Reserve Life Ins. Co. v. Heidel, supra; Ohio Bell Tel. Co. v. Public Utilities Com.*, 301 U. S. 292; *Sulzberger v. Continental Cas. Co.* (CCA, Mo. 1937), 88 F. 2d 122; *Whittaker v. McLean* (1941), 73 App. D. C. 259; *U. S. v. New York, N. H. & H. R. R.*, 165 F. 742; *Sunderland v. U. S., Beck v. Wing's Field, Kroger Groc. & Bkg. Co. v. Stewart, Alford v. U. S., Cochrane v. U. S., Coffin v. U. S., supra; Hurtado v. Cal.*, 110 U. S. 516 (Citing *Brown v. N. J.*, 175 U. S. 172); *DiBona v. Phila. Transp. Co.*, 356 Pa. 204.

IX. The decision of the Circuit Court in finding and holding that the Trial Judge was right in his rulings, in the conduct of the case, and that there were no prejudicial errors committed, involves most important and far-reaching questions in will cases, and it is submitted that, in the interest of justice and under its broad supervisory powers, this Court should settle the questions raised. The findings and holdings in the opinion of the Circuit Court are not only in conflict with the decisions of other Circuit Courts and of this Court, but also directly contrary to rulings of the great majority of State courts involving will contests.

Prayer for Writ.

WHEREFORE, the Petitioners pray that a writ of certiorari be issued out of and under the seal of this Court, directed to the United States Court of Appeals, District of Columbia Circuit, commanding that Court to certify and

send to this Court for its review and determination a full and complete transcript of all the proceedings in the cause entered on its docket as No. 9635, entitled Ethel Ellyson Pollard et al. v. Clayton Hawfield et al.; that the said Judgment of the United States Court of Appeals (District of Columbia Circuit) may be reviewed and reversed by this Honorable Court; and that your Petitioners may have such other and further relief in the premises as to this Court may seem just and proper.

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